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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-63

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

SOUTHGATE DEVELOPMENT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR LORAIN COUNTY, OHIO

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In The

Supreme Court of the United States

October Term, 1979

No. .....

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

SOUTHGATE DEVELOPMENT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR LORAIN COUNTY, OHIO

The Petitioner, Columbia Gas Transmission Corporation (Columbia Transmission), respectfully prays that a writ of certiorari issue to review the decision and journal entry of the Court of Appeals for Lorain County, Ohio, entered in this proceeding on December 20, 1978. This decision was made final by the order without opinion of the Supreme Court of Ohio, entered in this proceeding on April 20, 1979, refusing to accept Columbia Transmission's appeal.

OPINIONS BELOW

The order of the Supreme Court of Ohio refusing to accept Columbia Transmission's appeal appears in the Appendix hereto at 2a. This decision is not reported.

The decision and journal entry of the Court of Appeals for Lorain County, Ohio, which is the highest court decision on the merits, appears in the Appendix hereto at 3a. This decision is not reported.

The opinion of the Court of Common Pleas of Lorain County, Ohio, dated May 1, 1978, appears in the Appendix hereto at 10a. This opinion is not reported.

JURISDICTION

The order of the Supreme Court of Ohio, refusing to accept Columbia Transmission's appeal, was entered on April 20, 1979; and this petition for certiorari was filed within 90 days of that date. For jurisdictional purposes, such order made final the judgment of the Court of Appeals for Lorain County. The trial was bifurcated (Appendix at 11a), and the issue of liability has been finally determined. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, under the Supremacy Clause of Article VI of the Constitution of the United States, a natural gas company's curtailment plan approved by the Federal Energy Regulatory Commission in compliance with Order No. 467-B of the predecessor Federal Power Commission, which order and approval were issued under the Natural Gas Act to deal with the Nation's then inadequate gas supply, shields the natural gas company from damages in a State court for alleged breach of contract to furnish a supply of natural gas for industrial consumption, when the industrial service being sought would have violated the curtailment plan.

2. Whether, under the Supremacy Clause of Article VI of the Constitution of the United States, a direct retail

sale of natural gas in Ohio from an interstate transmission pipeline is subject to the jurisdiction of the Public Utilities Commission of Ohio except to the extent that the Federal Energy Regulatory Commission has jurisdiction under the Natural Gas Act over the transportation of natural gas in interstate commerce.

CONSTITUTION AND STATUTES

Article VI, Clause 2, United States Constitution

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 402(a), Department of Energy Organization Act (42 U.S.C. § 7172(a))
and
Sections 1, 4, 5, 7, and 16, Natural Gas Act (15 U.S.C. §§ 717, 717c, 717d, 717f, 717o)

The pertinent text of these statutes is set forth in the Appendix beginning at 17a.

REGULATORY ORDERS

Federal Power Commission Order No. 467-B, Utilization & Conservation of Natural Resources, 49 F.P.C. 583 (1973)
and
Federal Energy Regulatory Commission orders issued October 26 and November 18, 1977, at Columbia Gas Transmission Corp., Docket No. RP72-89

The pertinent text of these regulatory orders is set forth in the Appendix beginning at 29a.

STATEMENT OF THE CASE

In 1963, a predecessor of Columbia Transmission named Ohio Fuel Gas Company (Ohio Fuel) was engaged in the production, purchase, transportation, and wholesale and retail sale of natural gas. It was both a public utility regulated by the Public Utilities Commission of Ohio (PUCO) in its retail sales operation, and a "natural gas company" as to its interstate wholesale and transportation functions under the Natural Gas Act. Jurisdiction under the Act was vested in the Federal Power Commission (FPC), which has been succeeded by the Federal Energy Regulatory Commission (FERC) for the purposes of this case. Section 402(a), Department of Energy Organization Act, 42 U.S.C. § 7172(a).

To serve its growing utility markets in Lorain County, Ohio, Ohio Fuel acquired right-of-ways and then constructed a new interstate transmission pipeline in that area. One right-of-way, in the City of North Ridgeville, crossed a tract owned by Cleveland Trust Company as Trustee, predecessor of the Respondent, Southgate Development Corporation (Southgate). This 1963 right-of-way deed, like thousands of others, included a covenant for gas service to the landowner. Its only peculiarity was that the covenant was not limited to residential or domestic usage: it envisioned industrial service.

At about the same time, to avoid the problems of concurrent Federal and State regulation, Ohio Fuel was obtaining FPC and PUCO approval to spin off its retail utility business to a new company named Columbia Gas of Ohio, Inc. The spin-off took effect January 1, 1964.

In 1971, the residual and thus purely wholesale Ohio Fuel merged into Columbia Transmission. See *Columbia Gas Transmission Corp.*, 45 F.P.C. 398 (1971). Consequently, for its entire history, Columbia Transmission has been regulated exclusively by the FPC, now the FERC.

Southgate acquired the North Ridgeville tract in 1974, and admittedly knew that the natural gas shortage was near its height. Columbia Transmission was operating under the FPC's policy decisions, with severe curtailment of all existing wholesale customers under its approved FPC Gas Tariff. Columbia Gas of Ohio had been ordered by the PUCO not to accept any new customers.

Thus Southgate knew it could not get gas service from Columbia Gas of Ohio. Accordingly, suit was brought to obtain service directly from Columbia Transmission on a pure contract theory: counsel for Southgate stated at the trial on December 16, 1977, that his case was "a simple straightforward action for breach of contract". Under the right-of-way covenant, he claimed, Southgate had the right to buy gas "without limit as to quantity", "without being conditioned upon approval by any regulatory authority", and "beyond the regulatory jurisdiction of the State of Ohio", for what Southgate's president described as "heavy industry" consumption.

How the Federal Questions Were Raised and Decided Below

Columbia Transmission's basic defense was that under the approved Ohio Fuel spin-off, the duty to serve Southgate had devolved upon Columbia Gas of Ohio. The trial court found the facts to be that both the PUCO and the FPC had intended for all of Ohio Fuel's retail service obligations to devolve upon Columbia Gas of Ohio in the 1964 spin-off, and that the companies had carried out this intent. It concluded that the regulatory orders were lawful, and rendered judgment for Columbia Transmission. (Appendix at 14a-15a, 16a.)

A separate "Fourth Defense", however, led directly to the primary federal question presented in this appeal. Columbia Transmission pleaded that it could not lawfully provide gas for industrial consumption by Southgate under the then effective curtailment orders of the FPC. (By the time of trial, subsequent FERC orders had superseded the FPC orders in effect when the Answer was filed. The FERC orders are set forth in the Appendix beginning at 41a, and were introduced in evidence at the trial.)

The trial court did not reach this question because it based its judgment for Columbia Transmission on the basic defense that Ohio Fuel's duty to serve retail customers had been spun off in 1964. (Appendix at 16a-17a.)

Before the Court of Appeals for Lorain County, Columbia Transmission's Reply Brief at 34-38 (Sept. 18, 1978) urged the substance of the Fourth Defense, and specifically argued that "[i]f the courts of Ohio should award damages, they would be imposing State policy ahead of and in opposition to FERC policy; and . . . this would be invalid under the Supremacy Clause."

The Court of Appeals completely ignored this argument, and held that Columbia Transmission had a contractual duty to Southgate which had been breached. Thus it ruled that Southgate was entitled to "damages from that breach, the existence and amount of which must be determined by the trial court."* (Appendix at 8a.)

* The fact that the Court of Appeals was totally silent on this primary federal question is the reason that Columbia Transmission is filing a petition for certiorari rather than an appeal. "[T]he state court must do something more than remain silent or ambiguous [on the Federal law at issue] before a denial of validity will be ascribed to its action. The Supreme Court's [appeal] jurisdiction under § 1257(1) must rest upon far firmer ground than guesswork as to the nature of the state court decision." R. STERN and E. GRESSMAN, SUPREME COURT PRACTICE at 160 (5th ed. 1978).

Before the Supreme Court of Ohio, Columbia Transmission's Memorandum in Support of Jurisdiction at 17, 47-49 (Feb. 16, 1979), argued that "a judgment for damages against Columbia Transmission in this action would be unconstitutional under the Supremacy Clause, U. S. Const. art. VI, cl. 2, because the judgment would be State action in conflict with the FPC/FERC policy decision to base curtailment during the gas shortage on gas usage rather than contractual commitment, and to restrict damage litigation against pipeline companies with approved curtailment plans." As noted, the Supreme Court of Ohio refused without opinion Columbia Transmission's appeal (Appendix at 2a).

The second federal question, concerning the FERC's jurisdiction over direct retail sales, was raised by Southgate in its argument to the trial court. "The FPC's (now FERC's) regulatory jurisdiction is exclusive," Southgate urged, working a total "prohibition against state regulation of the transaction which Columbia Transmission is bound to perform". Plaintiff's Post-Trial Brief at 6, 8 (Jan. 17, 1978). Columbia Transmission rebutted by citing the contrary rulings not only from Ohio courts, but also from this Court.* Reply Brief of Defendant at 2, 11 (Jan. 31, 1978).

The trial court rejected Southgate's theory of FERC jurisdiction (Appendix at 13a, 15a).

* In Ohio, retail utility service direct from interstate transmission lines—whether under covenants like Southgate's or otherwise—had long been regulated by the PUCO and municipal franchises. *State ex rel. Bricker* v. *Industrial Gas Co.*, 58 Ohio App. 101, 16 N.E.2d 218 (1937); *Industrial Gas Co.* v. *Public Utilities Commission*, 135 Ohio St. 408, 21 N.E.2d 166 (1939); *Laughlin* v. *Public Utilities Commission*, 6 Ohio St. 2d 110, 216 N.E.2d 60 (1966). This was of course consistent with the Court's decisions, *e.g.*, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947), and *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951).

The matter was fully reargued before the Court of Appeals. *Compare* Brief of Plaintiff-Appellant at 2, 22-24, 28-30 (Aug. 5, 1978), *with* Brief of Defendant-Appellee at 18-21, 24-26 (Sept. 18, 1978).

Though the Court of Appeals did not articulate its reasoning, it reversed the trial court's holding on the effect of Ohio Fuel's 1964 spin-off. The Court of Appeals approved the trial court's findings of fact (Appendix at 6a-7a), but implicitly held in the end that the facts were not controlling.

Specifically addressing the second federal question, the Court of Appeals agreed with Southgate that the FERC's jurisdiction over direct retail sales from interstate pipelines was exclusive:

> "We also reject defendant's argument . . . that any attempt by . . . Columbia Transmission . . . to make a direct sale in Ohio would make that company a public utility subject to regulation by the PUCO . . . . [W]hen the state and the federal government concurrently regulate an area, the supremacy clause of the United States Constitution dictates that the state must yield . . . ." (Appendix at 7a.)

The question was presented to the Supreme Court of Ohio. *Compare* Columbia Transmission's Memorandum in Support of Jurisdiction at 22-27 (Feb. 16, 1979), *with* Southgate's Memorandum Opposing Jurisdiction at 4-12 (filed Mar. 26, 1979). As noted, the Supreme Court of Ohio refused without opinion to accept Columbia Transmission's appeal (Appendix at 2a).

Consequently, the Court of Appeals for Lorain County is the highest Ohio court that actually ruled on the merits of the federal questions. Since the 1977 trial was limited to the issue of liability (Appendix at 11a), the

judgment of the Court of Appeals is final rather than interlocutory for the purposes of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

(1) BY UPHOLDING SOUTHGATE'S CLAIM FOR DAMAGES AND REFUSING TO CONSIDER THE EFFECT OF THE FEDERAL POWER COMMISSION'S ORDER NO. 467-B AND COLUMBIA TRANSMISSION'S CURTAILMENT PLAN APPROVED THEREUNDER, THE COURT OF APPEALS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT IN ACCORD WITH THE COURT'S DECISION IN *FPC V. LOUISIANA POWER & LIGHT CO.*, 406 U.S. 621 (1972) —THEREBY EFFECTIVELY NULLIFYING THE EXCLUSIVE JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION AND ITS PREDECESSOR AGENCY OVER THE EMERGENCY ALLOCATION OF THE INTERSTATE GAS SUPPLY.

The primary question surely possesses great substance. First and foremost, it involves the allocation of power between Federal and State governments—a continuing source of constitutional tension. It also involves the natural gas shortage, an aspect of the worldwide energy crisis that has seriously affected the United States.

Columbia Transmission's dilemma is simply this: because it has obeyed binding FERC orders, it has been found liable for damages by the courts of Ohio. This is exactly the kind of dilemma the Supremacy Clause is intended to resolve.

A State government has many means of coercion. Any government does—statutory and administrative standards, criminal sanctions, civil penalties, forfeitures, injunctions, and, as in this case, a private remedy giving rise to damages.

Shelley v. *Kraemer*, 334 U.S. 1 (1947) held that State courts can not enforce private contracts imposing racial

covenants, because the judgments would be State action violative of the Equal Protection Clause, U. S. CONST. amend. XIV, § 1, cl. 4. Similarly, Columbia Transmission submits that State courts can not enforce private contracts by judgments which effectively nullify Federal policy decisions lawfully promulgated by an agency acting within its jurisdiction, because the judgments would be State action violative of the Supremacy Clause.

By ruling that Southgate is entitled to damages, the court below effectively nullified the FERC's exclusive jurisdiction over the allocation of the interstate gas supply. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The central point in *Louisiana Power* was that the interstate gas supply should be allocated during the emergency on the basis of a national view, rather than the "varied regulatory programs of state courts and agencies interpreting a countless number of different contracts and applying a variety of state agency rules." (406 U.S. at 633.) State court damages against companies like Columbia Transmission would thwart this reasoning.

Reduced to its skeleton, Columbia Transmission's postulation is that (i) the State court ignored the FPC's Order No. 467-B reprinted in Appendix at 29a, and thus effectively refused to recognize that such order was intended to limit Southgate's contract rights, and (ii) this State court judgment can not stand under the Supremacy Clause, because Order No. 467-B is one of the "Laws of the United States" binding on the "Judges in every State".

To test this postulation, the Court must first look to the FPC/FERC curtailment policies during the emergency of the natural gas shortage.

The plain fact is, the evidence showed that Columbia Transmission's gas supply could not, at any time from Southgate's first demand to the day of trial, meet the full requirements of its existing wholesale customers. By orders in Docket No. RP72-89, the FPC and the FERC approved Columbia Transmission's curtailment plan to allocate its gas supply shortfall among its wholesale customers conformably to FPC/FERC policies respecting the natural gas shortage.*

These Federal policies were not lightly adopted. After full investigation, the FPC promulgated a mandatory curtailment program designed to reallocate gas formerly committed to existing large commercial and industrial users (known generally as "low-priority load") to residential and small commercial users (known generally as "high-priority load"), and to prohibit any new sales to new low-priority customers such as Southgate, and to sharply restrict litigation over contract claims against interstate gas companies in curtailment.

The FPC's original policy decision held that an approved curtailment plan constituted an absolute defense to an action for breach of contract. The Fifth Circuit reversed in *International Paper Co.* v. *FPC*, 476 F.2d 127 (5th Cir. 1973). The FPC revised its position in *United Gas Pipe Line Co.*, 49 F.P.C. 1211 (1973). In this opinion, the FPC held that an approved curtailment plan would be a defense to an action for breach of contract except where the pipeline had to curtail its service

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* All of these orders are styled *Columbia Gas Transmission Corp.* The first two are reported at 48 F.P.C. 647 and 51 F.P.C. 1842. The later three are as yet unreported. All five orders were introduced in the record as Stipulated Exhibits 23, 73, 79, 90, and 93. The two orders in effect at the time of trial are reprinted in the Appendix beginning at 41a.

due to its own negligence, bad faith, or wrongful conduct. The FPC opinion states this in no uncertain terms:

> "With regard to the question of general damage liability for breach of contract based upon curtailment of gas deliveries, we agree with the reasoning of the concurring opinion in *International Paper* that two categories of litigation are presented: (1) litigation in which a customer is unable to show that his service was reduced by anything other than a governmentally ordered curtailment plan which was necessary as a result of the gas shortage, and (2) litigation in which it can be shown that the pipeline's need to curtail resulted from its own negligence, bad faith, or other wrongful conduct. With regard to the first situation, we think that pipeline must be completely exonerated as a matter of law." (49 F.P.C. at 1220.)

In the same opinion, the FPC summed up the bedrock justification for its shield against damage suits like Southgate's:

> "Contractual rights must yield to valid administrative orders which are necessary to protect the public interest, *i.e.*, to assure an equitable distribution of gas supply during an acute shortage of natural gas, *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). In this situation, the pipeline cannot be required to comply with a valid Commission order and at the same time be liable for damages as a result of such compliance. *Cf. Carter* v. *AT&T Co.*, 365 F.2d 486, 496 (CA5-1966)." (49 F.P.C. at 1220.)

The overarching curtailment policy was settled by the FPC's Order No. 467-B, reported as *Utilization & Conservation of Natural Resources*, 49 F.P.C. 583 (1973), reprinted in the Appendix at 29a. This order noted that the natural gas industry was beset by "sharp differences in

curtailment philosophy . . . *e.g.*, curtailment based on end use . . . and curtailment implementation". It also cited the regulatory necessity of ending the threat of "civil liability" to pipeline companies which curtailed without FPC approval (49 F.P.C. at 583, 584; Appendix at 31a-32a). Accordingly, the FPC ordered all curtailment plans by interstate pipeline companies to be based on the actual end uses of the gas instead of contracts—in short, against Southgate's position and contrary to the Court of Appeals decision.

The FPC's policy decision was affirmed in *Consolidated Edison Co.* v. *FPC*, 512 F.2d 1332 (D.C. Cir. 1974). The D.C. Circuit upheld the FPC's "policy to require curtailments on the basis of the uses made of the gas . . . rather than on the basis of prior contractual commitments" (512 F.2d at 1336). Moreover, the D.C. Circuit noted, with no sign of disapproval, the FPC's limitation of civil liability (512 F.2d at 1340).

Under Federal law, therefore, Southgate could not be entitled to damages unless it had shown that Columbia Transmission's "own negligence, bad faith or other wrongful conduct" *caused* its supply shortage.

The record was closed without a shred of evidence of such wrongful conduct. The FPC policy decision on damages against interstate pipelines is an enunciation of Federal policy by the administrative agency empowered to make it. Such administrative policy decisions are Federal law for Supremacy Clause purposes, *Free* v. *Bland*, 369 U.S. 663 (1962), so that a contrary State judgment allowing damages can not stand.

(2) BY UPHOLDING SOUTHGATE'S CLAIM FOR DAMAGES AND REFUSING TO CONSIDER THE EFFECT OF THE FEDERAL POWER COMMISSION'S ORDER NO. 467-B AND COLUMBIA TRANSMISSION'S CURTAILMENT PLAN APPROVED THEREUNDER, THE COURT OF APPEALS RENDERED A DECISION IN SUBSTANTIAL CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE TENTH CIRCUITS, AS WELL AS ADMINISTRATIVE DECISIONS.

Southgate would no doubt attempt to answer the foregoing by pointing out that the Court of Appeals had accepted (Appendix at 8a) that the technical breach of contract was not the failure to supply gas, but rather the "refusing to file with the FPC an application for a Certificate of Public Convenience and Necessity authorizing direct service as partial consideration for the right-of-way". Plaintiff-Appellee's Memorandum Opposing Jurisdiction at 11 (filed Mar. 26, 1979). The underlying logic is that Southgate, as a would-be retail customer, could not itself initiate a certificate case under Section 7 of the Natural Gas Act, so that Columbia Transmission must make the filing if the FERC's ruling is to be had.

The following paragraphs show why such a certificate application would have been a vain and futile act: under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), the FERC would surely have refused a certificate for preferential low-priority service to Southgate; and the refusal would have been upheld on appeal under the holdings in analogous appeals.

To repeat, from prior to Southgate's first demand in 1973 Columbia Transmission never had an adequate gas supply. It was always in curtailment. At the time of trial, Columbia Transmission was 22.3% short of being able to serve its existing wholesale customers, much less to add new business.

Under these circumstances, the notion is frivolous that the FERC would have given preferential treatment to Southgate's low-priority "heavy industry" use at the expense of existing customers whose uses are of the same or higher priority.

Before the Ohio courts, Southgate sought support for its case in the fact that the FPC twice approved main line taps for service under right-of-way covenants by interstate pipeline companies, even when they were in curtailment like Columbia Transmission. *E.g.*, Brief of Plaintiff-Appellant at 26, 29-30 (Aug. 5, 1978). But a reading of the two decisions, in light of two latter decisions, shows how weak Southgate's position is:

Transwestern Pipeline Co., FPC Docket No. CP75-17 (Oct. 17, 1974) approved small sales to three farmers, but emphasized the de minimis nature of the sales and the fact that pre-existing right-of-way covenants had been exempt from Transwestern's curtailment plan;

Northern Natural Gas Co., FPC Docket No. CP75-333 (Aug. 13, 1976) approved sales for residential uses, the highest priority, under right-of-way covenants, where the right-of-ways had been acquired "for obtaining new gas supplies" (mimeo at 3). The FPC emphasized the ad hoc nature of its decision:

> "In the absence of some compelling public interest consideration, existing customers should not be cut off in order that new customers may receive service who had never previously received natural gas deliveries." *(Ibid.)*

Cities Service Gas Co., FPC Docket No. CP-77-89 (Apr. 5, 1977) flatly rejected a proposal to serve

new right-of-way customers where the record did not show either the high-priority nature of the proposed use or the exceptional circumstances warranting new service; and

Kentucky West Virginia Gas Co., FERC Docket No. CP76-424 (Nov. 10, 1977) was a declaratory order concerning a Kentucky statute giving priority to certain rural landowners. The FERC held that its jurisdiction over allocation of the interstate gas supply was superior to Kentucky policy, statutory or otherwise.

By any test, Southgate does not match the justification for any potential users the FPC favored in the first two cases: Southgate sought gas service for low-priority "heavy industry" use; and as the trial court found (Appendix at 16a), Southgate never relied to its detriment on the covenant in the right-of-way deed.

City of Huntingburg v. *FPC*, 555 F.2d 1033 (D.C. Cir. 1977) implicitly supports the cited administrative decisions. An interstate pipeline company like Columbia Transmission acquired a substantial new gas supply, and applied for authority to allocate it among its existing wholesale customers. The City intervened, pleaded its own gas supply shortage, and asked for some of the new gas as a new customer. The FPC rejected the City's plea, and the D.C. Circuit's per curiam affirmance shows why Southgate could never have persuaded the FERC to give it preference over existing residential consumers:

"[T]he court finds no basis for reversal in this case; the decision not to add new customers to the Mich-Wis load, but rather to use any 'expansion' gas to soften curtailments impacts to existing customers (directly or by storage injection) is not arbitrary or capricious, but rational and grounded

in the record evidence that Huntingburg's uses were at least no higher than those served by denying interconnection." (555 F.2d at 1035.)

The Tenth Circuit recently issued a gas shortage opinion which is consistent with *Shelley* v. *Kraemer*, *supra*, at 9-10, as well as *Free* v. *Bland*, *supra at* 13. *Backus* v. *Panhandle Eastern Pipe Line Co.*, 558 F.2d 1373 (10th Cir. 1977), struck down an Oklahoma statute which required interstate pipeline companies to make gas service available to any landowner whose property was crossed by a pipeline. The Tenth Circuit held that because the statute "creates an exclusion from FPC regulation and permits 'private interests to subvert public welfare' ", it violated the Supremacy Clause (558 F.2d at 1376). The defect of the statute was its attempt to allocate the interstate gas supply on the primary basis of State policy rather than federal—exactly what was ruled out by *FPC* v. *Louisiana Power & Light Co.*, *supra* at 10.

Backus, therefore, held that State statutes are subordinate to valid FERC decisions under the Natural Gas Act. By extension, *Backus* suggests that an award of damages on Southgate's theory of the case would be unconstitutional State action under the Supremacy Clause. Such a damage award can have only one policy purpose—to deter or prevent Columbia Transmission from following FERC orders during the gas shortage emergency. The damages Southgate seeks are based on State law concepts, that is, the primacy of the right-of-way covenant over FERC policies and orders allocating Columbia Transmission's gas supply. If the courts of Ohio award damages, they are imposing State policy ahead of and in opposition to FERC policy, and in substantial conflict with decisions of two United States Courts of Appeals.

(3) BY HOLDING THAT THE FEDERAL ENERGY REGULATORY COMMISSION HAD EXCLUSIVE JURISDICTION OF DIRECT RETAIL SALES FROM AN INTERSTATE TRANSMISSION PIPELINE, TO THE EXCLUSION OF THE PUBLIC UTILITIES COMMISSION OF OHIO, THE COURT OF APPEALS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

This error was induced by counsel for Southgate. As noted *supra* at 5, they have always contended that direct retail sales from interstate transmission pipelines were exclusively regulated by the FERC.

Southgate's false premise was long ago rejected by the Court itself, which held that State regulatory agencies could regulate direct sales from interstate pipelines just as they regulated any other retail sales. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947); *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329 (1951).*

The significance of this error to Columbia Transmission is that Southgate does not stand alone. The evidence

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* As this Court has frequently pointed out, Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), gives the FPC, now the FERC, jurisdiction over three things only—(1) transportation of gas in interstate commerce, (ii) wholesale sales in interstate commerce, and (iii) "natural-gas companies" doing such things. The reason is simple: the States had the constitutional power to regulate retail sales of gas, *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920), but not the interstate wholesale part of the gas business, *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924).

The legislative history of the Natural Gas Act shows that Congress knew this perfectly well. Studies submitted to both House and Senate analyzed the constitutional limitations on State regulation flowing out of the Commerce Clause, U. S. Const. art. I, § 8, cl. 3. Both studies cited the *Pennsylvania Gas* and *Kansas Natural* decisions. See Part III of D. DeVane and T. Tingley, Brief in Support of Constitutionality (Apr. 2, 1936), submitted to Hearing on H. R. 11662 to Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and for Other Purposes before a Subcommittee of the Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. at 14-16 (1936), and S. Rep. No. 1162, 75th Cong., 1st Sess. at 1-2 (1937).

showed that 20 *thousand* retail customers, in Ohio alone, are served directly from Columbia Transmission's interstate transmission system. Heretofore those sales have been made by Columbia Gas of Ohio, under PUCO regulation, which purchased the gas at wholesale from Columbia Transmission, under FERC regulation. Now beyond any doubt, both regulatory agencies will ignore the Court of Appeals error on this point: the FERC will not regulate the retail sales, and the PUCO will. And if that should come to pass, then Columbia Transmission would be faced with the same dual regulation that afflicted Ohio Fuel before the 1964 spin-off to Columbia Gas of Ohio.

The Court of Appeals correctly cited *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, (1972), as having decided "that curtailment regulations [of an interstate company like Columbia Transmission] are regulations of the transportation of natural gas and, thus, within F.P.C. jurisdiction." (Appendix at 7a.) On that premise, citing Sections 1, 4, 5, 7, and 16 of the Natural Gas Act, *Louisiana Power* sustained the FPC's regulation of curtailment of the entire interstate gas supply of a company having both wholesale and retail sales—an integrated company, that is, like Ohio Fuel used to be.

But *Louisiana Power* also recognized, if only by implication, that a State has power to allocate its gas supply not affecting the interstate gas supply—that is, after the FPC (now the FERC) has made the allocation among the several States: it cited *Panhandle/Indiana* for the principle that "Congress 'meant to establish a comprehensive and effective regulatory scheme' . . . of dual state and federal authority." (406 U.S. at 631.) As the Court said in an earlier case involving a proposed direct industrial sale, "The [Federal Power] Commission cannot order

a natural gas company to sell gas to [direct sale] users that it favors; it can only exercise a veto power over proposed transportation . . . ." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1961).

The trial court found, as a matter of fact, that when Ohio Fuel spun off its retail utility function to Columbia Gas of Ohio, they and the PUCO and the FPC envisioned that Ohio Fuel or Columbia Transmission would not thereafter be subject to State regulation by the PUCO. Now, under the Court of Appeals decision, the threat of such State regulation is there: the FERC obviously will not regulate direct industrial sales, or any direct sales.

The error below should be corrected, and the proper balance reiterated between PUCO and FERC jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for Lorain County, Ohio.

Respectfully submitted,

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Counsel for Appellant

July 13, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

SOUTHGATE DEVELOPMENT CORPORATION,
Respondent.

CERTIFICATE OF SERVICE

I, H. L. Snyder, one of the attorneys for Columbia Gas Transmission Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of July, 1979, three copies of the Petition for A Writ of Certiorari were mailed, in a duly addressed envelope, with first class postage prepaid, to Michael J. Canter, Esq., 52 East Gay Street, Columbus, Ohio 43215, counsel for Respondent. I further certify that all parties required to be served have been served.

s/H. L. SNYDER

H. L. SNYDER
P. O. Box 1273
Charleston, WV 25325

Counsel for Petitioner

IN THE

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APPENDIX
TO
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TO THE COURT OF APPEALS
FOR LORAIN COUNTY, OHIO

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ORDER OF THE SUPREME COURT OF OHIO
(Apr. 20, 1979)

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	*1979 TERM*
City of Columbus.	*To wit: April 20, 1979*
Southgate Development Corp., Appellee, vs. Columbia Gas Transmission Corp., Appellant.	*No. 79-215* **MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS** *For Lorain County* **TO CERTIFY ITS RECORD**

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Donald R. Hayes

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of June 14, 1979

SEAL

Thomas L. Startzman, Clerk

Sam F. Adkins, Deputy

DECISION AND JOURNAL ENTRY
OF THE COURT OF APPEALS
FOR LORAIN COUNTY, OHIO
(Dec. 20, 1978)

STATE OF OHIO)
) ss: IN THE COURT OF APPEALS
LORAIN COUNTY) NINTH JUDICIAL DISTRICT

SOUTHGATE DEVELOPMENT CORPORATION *Plaintiff-Appellant*	**C.A. NO. 2739**
v.	Appeal From Judgment Entered In The Common Pleas Court Lorain County, Ohio
COLUMBIA GAS TRANSMISSION CORPORATION *Defendant-Appellee*	**CASE NO. 78512 74**

DECISION AND JOURNAL ENTRY

Dated: December 20, 1978

This cause was heard October 18, 1978, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

BELL, PJ.

Plaintiff-appellant, Southgate Development Corporation (Southgate), appeals a judgment in favor of defendant-appellee, Columbia Gas Transmission Corporation. We formerly ruled in this cause, and the Ohio Supreme Court affirmed, that the Common Pleas Court had the jurisdiction to render a declaratory judgment of the

rights and obligations arising from a contractual agreement between a private corporation and a regulated public utility. Southgate Development Corporation Lorain No. 2343 (9th Dist. Ct. App., January 14, 1976), aff'd 48 Ohio St. 2d 211 (1976).

In 1974, Southgate purchased from Cleveland Trust property burdened by a pipeline easement. Cleveland Trust granted this easement in 1963 for placement of a transmission pipeline to Ohio Fuel Gas Co. for consideration of one dollar and the right to purchase natural gas from the pipeline for use on the premises. At that time, Ohio Fuel Gas Company was an integrated gas company, meaning it both transmitted gas interstate and distributed gas intrastate. Partly to avoid the problems of concurrent state and federal regulation, the Columbia Gas of Ohio Corporation was formed as a "spin-off" company in 1964 to handle all retail sales, subject to regulation by the Public Utilities Commission of Ohio (PUCO). In 1971, Ohio Fuel merged with Columbia Gas Transmission Corporation and controlled the interstate transmission operations, regulated by the Federal Energy Regulatory Commission, formerly the Federal Power Commission. Sometime after the easement was executed, strict governmental regulations were promulgated that severely curtailed the distribution of natural gas, due to national shortages.

Southgate requested gas service from Columbia Transmission pursuant to the provisions of the right-of-way easement assigned by Cleveland Trust to Southgate. After its requests were refused, Southgate sought a declaratory judgment as to the duties and obligations of Columbia Transmission, including a determination that defendant be bound to provide gas service under the

right-of-way easement. The trial court found that Columbia Gas of Ohio, not Columbia Transmission, was the obligor under the easement agreement. Southgate appeals that judgment and assigns as error:

> "1) The Common Pleas Court erroneously concluded that the right to purchase gas from an interstate gas transmission pipeline granted in a right of way easement covenant as part of the consideration for the right of way is subject to regulation by the Public Utilities Commission of Ohio and, therefore, 'devolved' upon Columbia Gas of Ohio, Inc. pursuant to PUCO order, whereas in truth such right is subject to regulation only by the Federal Power Commission (now Federal Energy Regulatory Commission) and is beyond the jurisdictional reach of the Public Utilities Commission of Ohio, and
>
> "2) Columbia Transmission Corporation breached its obligation under the right of way covenant by refusing to take any action to comply therewith, including the filing of an application with the Federal Power Commission for a certificate of public convenience and necessity authorizing Columbia Transmission to fulfill its contractual obligation."

I

The issue before this court is, does Columbia Transmission owe a duty to Southgate under the terms of the right-of-way easement? It is clear that Southgate has a contract right to natural gas services, but against whom it may be enforced is in dispute. The corporate entity of Columbia Gas Transmission owns and operates the pipeline crossing Southgate's land. It is possible to install a tap on the mainline, from which natural gas could be distributed to Southgate, the method by which some

other consumers are supplied along this pipeline used primarily for transmission. There is evidence that other consumers receiving gas from the transmission pipeline are actually being serviced by Columbia Gas of Ohio. Through the use of dual purpose meters, Columbia Gas determines the volume of gas distributed in order to pay Columbia Transmission the wholesale cost and also to bill the consumer at the retail rate. There is no evidence that Columbia Transmission has ever directly serviced any retail customer or has any distribution system in operation.

Columbia Transmission argues that, because all of the retail operations of Ohio Fuel were "spun-off" to Columbia Gas, so also was any duty to provide retail gas service under the right-of-way easement, despite Columbia Transmission's present ownership and operation of the pipeline.

We reject defendant's contention that any duties under the right-of-way easement "devolved" upon Columbia Gas of Ohio, pursuant to a corporate reorganization. Columbia Transmission admits that, since its merger with Ohio Fuel Gas Company, it has enjoyed the benefit of the easement by operating the pipeline which burdens Southgate's property.

Defendant finds support for its "devolution" theory in the PUCO order in PUCO Case No. 30762 where the company is "authorized and ordered to assume all the Ohio Fuel's retail operations in accordance with the terms and conditions of the then effective***contracts and arrangements in the area then served by Ohio Fuel." We do not believe that this administrative order authorizes Columbia Transmission to use Southgate's land under the terms of the easement without fulfilling the

bargain that was the consideration for that easement, the promise of natural gas service.

The record reveals a course of business conduct which substantiates an "understanding" between Columbia Gas and Columbia Transmission that Columbia Gas handle all of the retail customers. Even if consistently followed, this custom cannot be a basis for the abrogation of contractual liability.

We also reject defendant's argument that the PUCO has exclusive jurisdiction in this matter. There is language in the discussion accompanying the PUCO order in Case No. 30672 expressing that agency's view that any attempt by Ohio Fuel, (now Columbia Transmission) to make a direct sale in Ohio would make that company a public utility subject to regulation by the PUCO. However, when the state and the federal government concurrently regulate an area, the supremacy clause of the United States Constitution dictates that the state must yield in any field which the federal regulatory agency preempts. Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456 (1943). The jurisdiction of the F.P.C., now the Federal Agency Resources [*sic*] Commission, was established in §1(b) of the Natural Gas Act, 15 USC §717. It has been held by the United States Supreme Court that curtailment regulations are regulations of the transportation of natural gas and, thus, within F.P.C. jurisdiction. F.P.C. v. Louisiana Power and Light Co., 406 U.S. 621 (19) [*sic*]. See also, Transwestern Pipeline Co., F.P.C. Docket No. CP 75-13 (1924). We specifically reject the argument that this question of federal or state regulation was finally determined by the Ohio State Supreme Court in Southgate v. Columbia Transmission of Ohio, supra. That case held that a common pleas

court was not divested of its jurisdiction over a contractual claim merely because one of the parties to the contract and its subject matter were regulated by government agencies.

The first assignment of error is well taken.

II

Based on our discussion above, we hold that Columbia Transmission had a contractual obligation to attempt to secure the necessary authorization to provide Southgate with natural gas service.

The question of when, or even whether, Southgate will receive natural gas service is for the appropriate regulatory agency to answer. We decide here only that Columbia Transmission had a duty to seek authorization under the right-of-way easement agreement. That duty was breached, and Southgate alleges damages from that breach, the existence and amount of which must be determined by the trial court.

We reverse and remand this cause to the trial court for further proceedings in accordance with this opinion.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Lorain County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be

file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

JAMES BELL

Presiding Judge
—for the Court—

VICTOR, J.
BRENNEMAN, J.
CONCUR

(Brenneman, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution).

APPEARANCES:

ROBERT E. LEACH, and MICHAEL J. CANTER, Attorneys at Law, 52 East Gay Street, P. O. Box 1008, Columbus, OH 43216, and J. C. WILLIAM TATTERSALL, Attorney at Law, 504 Lorain County Bank Bldg., Elyria, OH 44035 for Plaintiff-Appellant.

H. L. SNYDER, Attorney at Law, P. O. Box 1273, Charleston, WV 25325 and RAY L. MIRALDI, Attorney at Law, 199 North Leavitt Road, Amherst, OH 44001 for Defendant-Appellee.

OPINION OF THE COURT OF COMMON PLEAS OF LORAIN COUNTY, OHIO

(May 1, 1978)

FILED
COURT OF COMMON PLEAS

78 MAY 1 A11: 46
Lorain County
Common Pleas Clerk

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

CASE NUMBER: 78512-74

SOUTHGATE DEVELOPMENT CORP.,
Plaintiff,

-VS-

COLUMBIA GAS TRANSMISSION CORP.,
Defendant.

OPINION

Betleski, J.

In 1963, The Ohio Fuel Gas Company, (Ohio Fuel), an integrated transmission and distribution gas company, negotiated and accepted a right-of-way deed from the Cleveland Trust Company, (Cleveland Trust). The deed granted Ohio Fuel the right to construct and operate an interstate pipeline across land known as the Chamberlain Tract in North Ridgeville, Ohio. In return, Cleveland Trust and its heirs or assigns were given the right to purchase gas for use on the property while the pipeline was in operation. The plaintiff, Southgate Development Corporation, (Southgate), became Cleveland Trust's successor in interest and owner of the Chamberlain Tract in 1973.

In 1964, a new company called Columbia Gas of Ohio, Inc., (Columbia of Ohio), acquired all Ohio Fuel's PUCO regulated activities and facilities. Ohio Fuel, which in 1971 merged into the defendant Columbia Gas Transmission Corporation, (Columbia Transmission), retained all FPC regulated assets.

In 1974, Columbia Transmission refused Southgate's request for gas service for an industrial park the plaintiff proposed to build. Thereafter, Southgate, which contends the refusal constituted a breach of the right-of-way agreement, instituted this action. By agreement, the trial was bifurcated and proceeded on the question of liability only.

Several major issues were raised by the parties. The first which faces the court is the defense that Columbia Transmission does not have responsibility for providing service under the right-of-way agreement. The defendant maintains that duty devolved upon Columbia of Ohio in 1964 when it acquired Ohio Fuel's PUCO regulated assets. The plaintiff, however, contends that through the reorganization, Columbia of Ohio undertook responsibility only for ordinary utility service while Ohio Fuel retained the duty of service to Southgate under the right-of-way contract which it transferred to Columbia Transmission.

Contractual and utility gas service are not necessarily different and mutually exclusive. Certainly, plaintiff is correct that utility service is exacted by law from public utilities for the benefit of the general public. A public utility cannot arbitrarily or selectively choose its customers. *Southern Ohio Power Co.* v. *PUCO*, 110 Oh. St. 246 (1924). However, a utility company is not necessarily required to furnish service to all members of the

public. The duty to supply gas to a particular locality or customer rests upon the company's effective franchises or contractual obligations. *East Ohio Gas Co.* v. *Akron*, 81 Oh. St. 33, 90 N.E. 40 (1909). Also, while the company may not give undue or unreasonable preferences, distinctions in service may be based upon reasonable criteria, such as the existence of a right-of-way agreement. *The Railroad Commission of Ohio* v. *Hocking Valley R.R. Co.*, 82 Oh. St. 25, 91 N.E. 865 (1910).

Therefore, contrary to Southgate's contention, Cleveland Trust could well have bargained for and viewed as valuable a contractual right to industrial gas utility service. Such a right could insure supplies of gas which might otherwise not be provided. Indeed, the agreement indicated that gas was to be paid ". . . at the rate provided in the current established rate schedule . . ." filed with PUCO.

Southgate argued that an earlier Ohio Supreme Court decision in this case found contract rather than utility service was promised. Actually, that decision appears to have been simply a recognition of this court's jurisdiction to initially construe the contract. *Southgate Development Corp.* v. *Columbia Gas Transmission Corp.*, 48 Oh. St. 2d 211 (1976).

Even if Southgate did have a claim for contractual rather than utility gas service, it does not necessarily follow that its claim is now against Columbia Transmission. Even private contracts between public utilities and customers are subject to reserved governmental authority to modify them in the public interest. *Union Dry Goods Co.* v. *Georgia Public Service Com.*, 248 U.S. 372 cited in *Cleveland & Eastern Traction Co.* v. *PUCO*,

106 Oh. St. 210, 140 S.E. 139 (1922); *Taylor* v. *Nile*, 20 Oh. App. 293. Statutory authority provides that, with PUCO approval, any public utility may purchase or sell its property or business to any other public utility. O.R.C. 4905.48. PUCO approval of Ohio Fuel's sale to Columbia of Ohio has already been found to be proper. *Columbus* v. *PUCO*, 175 Oh. St. 61 (1963). Other cases have found that such PUCO approved agreements may properly affect companies' rights and responsibilities. *Ohio Consolidated Telephone Co.* v. *Communications Workers*, 162 N.E. 2d 905 (Clinton Com. Pl. Ct. 1959); *Ohio Midland Light & Power Co.*, v. *Columbia & Southern Ohio Electric Co.*, 123 N.E. 2d 675 (Franklin Com. Pl. Ct. 1954). Individual contracts entered by public utilities have previously been found subject to regulation by PUCO. *State ex rel Bricker* v. *Industrial Gas Co.*, 58 Oh. App. 101, 16 N.E. 2d 218 (1937); *Industrial Gas Co.* v. *PUCO*, 135 Oh. St. 408, 21 N.E. 2d 166 (1939). Therefore, Ohio Fuel's contractual responsibility could have been transferred to Columbia Gas of Ohio with PUCO approval.

The Natural Gas Act was intended to protect the public and gave the FPC broad powers complementary to those of the states "so that there would be no "gaps" for private interests to subvert the public welfare". *Transwestern Pipeline Co.*, FPC Docket No. CP75-17 (1974) (Stip. Ex. 76). In keeping with their complementary and comprehensive jurisdiction over gas supplies, even if contractual service to Southgate was outside the supervision of the PUCO, it would be subject to FPC regulation. The FPC, as well as PUCO, approved the proposed sale to Columbia of Ohio and, in doing so, both necessarily found the plan was consistent with the general public welfare.

While, therefore, it appears the government approved reorganization of 1964 could have transferred Ohio Fuel's obligation to Southgate to Columbia of Ohio, the question remains whether it did so. The evidence presented indicates it did. Both the FPC and PUCO approval orders specified Ohio Fuel was to retain interstate production and transmission properties and service only wholesale customers. Columbia of Ohio was to take over all retail sale facilities and activities. In neither order was any distinction made between retail service arising out of contract, such as that sought by Southgate, and service arising otherwise. Indeed, the PUCO order specifically mentions that all contract responsibilities to industrial customers were to pass to Columbia of Ohio.

As in 1964, Ohio Fuel was servicing many thousands of customers under right-of-way contracts, it is hard to believe such service was, without any provision, to be excluded from the general category of retail sales. It is even harder to believe that a distinction was to be drawn between customers who had exercised their rights prior to 1964 and those who sought to thereafter. In both cases, the contracts giving rise to those retail service rights were effective at the time of reorganization and were identical in nature and source. There were no rational reasons for different treatment in this case.

Certainly the practice which has followed indicates no such distinctions exist. While Ohio Fuel and, subsequently, the defendant may have contemplated servicing right-of-way grantors themselves, no evidence was presented that they have done so since 1964. Rather, testimony indicated that all gas service to right-of-way grantors, including those supplied through interstate mainline taps, has been provided by Columbia of Ohio. While

this practice is not determinative of who actually bears the duty, it indicates that all the parties involved regarded Columbia of Ohio as the obligor.

Further, a finding that Columbia Transmission bears the responsibility for supplying Southgate with gas would seriously hamper the recognized and approved aim of the reorganization plan. As an integrated gas company, Ohio Fuel was subject to regulation by both the FPC and PUCO. Avoidance of this dual regulation and its attendant complications was sought by transferring all state controlled activities and facilities to Columbia of Ohio. Both regulatory agencies found this was a legitimate aim of the plan and the realignment was found to be ". . . in accord with the federal plan of control as prescribed in the National Gas Act of 1938" as well as with Ohio Statutes. *City of Columbus* v. *PUCO*, 175 Oh. St. 61, 191 N.E. 2d 547 (1963).

The Natural Gas Act gave the FPC control only over interstate sales of gas for resale and specifically did ". . . not apply to any other sale of natural gas or to the local distribution of natural gas . . . .", 15 U.S.C., Section 717(B). The direct sale of gas for industrial or commercial consumption from interstate pipeline carriers is essentially local in character and is subject to state regulation. *Panhandle Eastern Pipeline Co.* v. *Michigan Public Service Com.*, 341 U.S. 329 (1951). Federal regulation is limited to interstate commerce at wholesale while states maintain the function of regulating the intrastate distribution and sale of gas such as is sought here. *Central State Electric Co.* v. *City of Muscatine, Iowa*, 325 U.S. 836 (1945). Therefore, if the avowed and approved aim of the plan, the avoidance of state regulations over the transmission company, is to be carried out, the duty of

service must necessarily have passed to Columbia of Ohio. This is so, particularly in view of the thousands of right-of-way grantor who are in similar situations to Southgate. Moreover, in its approval order, the PUCO, who has the initial responsibility for determining its own jurisdiction, indicated that any attempt to make a direct retail sale would again subject Ohio Fuel, now Columbia Transmission, to state regulation.

Columbia Transmission's second defense is, therefore, found to be valid. The duty of gas service to the plaintiff devolved upon Columbia of Ohio when it acquired Ohio Fuel's retail activities and facilities. This devolution was recognized and approved in orders of the PUCO and FPC which allowed the 1964 reorganization. Judgment, therefore, is for the defendant.

Finding Columbia of Ohio is the obligor of gas to Southgate under the right-of-way agreement does not deny the plaintiff a means to obtain service. When the curtailment orders are lifted, Southgate can obtain retail gas service from the distribution company who can in turn seek wholesale supplies from the defendant. The evidence clearly shows the plaintiff did not rely on any promised service from Columbia Transmission. Both gas companies told Southgate not to expect service, and testimony indicated the right-of-way covenant was not a major influence on plaintiff's decision to purchase the Chamberlain Tract. In view of plaintiff's lack of reliance and the low priority of its proposed gas uses, it is certainly not inequitable to find it does not have superior rights to service over curtailed customers.

This decision necessarily means plaintiff's Motion to Strike the Second Defense is denied. In arriving at the opinion, the court was mindful of the parties' objection

to particular exhibits, however, in the approach taken by the court, the exhibits objected to were not relied upon. Similarly, the conclusion of the court renders moot plaintiff's Motion to Dismiss the Third and Fourth Defenses.

UNITED STATES CONSTITUTION

Art. VI, cl.2 (Supremacy Clause)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

SECTION 402(a), DEPARTMENT OF ENERGY ORGANIZATION ACT

(42 U.S.C. § 7172(a))

§ 7172. JURISDICTION OF COMMISSION

Transfer of functions from Federal Power Commission

(a) (1) There are hereby transferred to, and vested in, the Commission the following functions of the Federal Power Commission or of any member of the Commission or any officer or component of the Commission:

(A) the investigation, issuance, transfer, renewal, revocation, and enforcement of licenses

and permits for the construction, operation, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other works for the development and improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters under part I of the Federal Power Act;

(B) the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress, under part II of the Federal Power Act, and the interconnection, under section 202 (b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection);

(C) the establishment, review, and enforcement of rates and charges for the transportation and sale of natural gas by a producer or gatherer or by a natural gas pipeline or natural gas company under sections 1, 4, 5, and 6 of the Natural Gas Act;

(D) the issuance of a certificate of public convenience and necessity, including abandonment of facilities or services, and the establishment of physical connections under section 7 of the Natural Gas Act;

(E) the establishment, review, and enforcement of curtailments, other than the establishment and review of priorities for such curtailments, under the Natural Gas Act; and

(F) the regulation of mergers and securities acquisition under the Federal Power Act and Natural Gas Act.

(2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:

(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and

(B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act.

SECTION 1, NATURAL GAS ACT (15 U.S.C. § 717)

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717 (a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717(c)]

SECTION 4, NATURAL GAS ACT (15 U.S.C. § 717c)

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the

jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company

to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

SECTION 5, NATURAL GAS ACT (15 U.S.C. § 717d)

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing

rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

SECTION 7, NATURAL GAS ACT (15 U.S.C. § 717f)

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair

its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f (a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f (b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such

certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary cerificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice, thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is

able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 15 U.S.C. § 717f (f)]

(g) Nothing contained in this section shall be construed as a limitation upon power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.S. § 717f (g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines

for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U.S.C. § 717f (h)]

SECTION 16, NATURAL GAS ACT (15 U.S.C. § 717o)

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commis-

sion shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

FEDERAL POWER COMMISSION ORDER NO. 467-B, UTILIZATION & CONSERVATION OF NATURAL RESOURCES, 49 F.P.C. 583 (1973)

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr. and Rush Moody, Jr.

UTILIZATION AND CONSERVATION OF NATURAL RESOURCES—NATURAL GAS ACT, DOCKET NO. R—469

ORDER NO. 467-B

ORDER MODIFYING ORDER 467, STATEMENT OF POLICY, AND ORDER DENYING MOTIONS FOR RECONSIDERATION

(Issued March 2, 1973)*

On January 8, 1973, the Commission issued Order No. 467 in Docket No. R-469, Statement of Policy, adding

*Published in the Federal Register on March 9, 1973 (38 F.R. 6384). Order issued April 25, 1973 denying motions for reconsideration, etc., 49 F.P.C.—.

Section 2.78(a) to the Commission's Rules of Practice and Procedure, as subsequently amended by Order No. 467-A, January 15, 1973, 49 FPC 85, 217. Numerous applications or petitions for rehearing, reconsideration, modification or clarification of Order Nos. 467 and 467-A have been filed. Those filing will be termed "Applicants".

In Order No. 467 the Commission issued a policy statement setting forth initial priorities to be followed by jurisdictional pipeline companies during periods of curtailed deliveries. The priorities are based on end use of the gas whether by direct purchase from the pipeline or by indirect purchase through a distributing company. Order No. 467 stated:

> When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.

And the Statement of Policy further provided that exceptions to the prescribed priority system would be permitted upon a finding of extraordinary circumstances after hearing initiated by a petition filed under Section 1.7(b) of the Commission's Rules of Practice and Procedure. Order No. 467-A provided that pipeline companies include provisions in their tariffs permitting them to respond to emergency situations.

The Applicants have made extensive arguments, both procedural and substantive. In a few cases the Applicants requested permission to intervene, and there was one separate Petition for Leave to Intervene (Rochester Gas and Electric Corporation). As discussed below, Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a binding rule without

further proceedings directed towards curtailment problems on specific pipelines. Therefore petitions to intervene are unnecessary, and petitions for rehearing do not lie. We treat the filings as petitions for reconsideration, and deny the same.

Reasons for Issuance of Order Nos. 467 and 467-A

Since the promulgation of Order No. 431, 45 FPC 570 (1971), the need for Commission guidance in curtailment planning has become apparent. The curtailment plans proposed by those pipelines which have filed pursuant to Order No. 431 reflect sharp differences in curtailment philosophy (*e.g.*, curtailment based on end use vs. curtailment based on pro rata reduction of contract entitlements) and curtailment implementation. As a consequence, the hearing records brought before us lack uniformity in the quantum of evidence relating to consumer impact and end use allocation patterns. The articulation and implementation of allocation policies on a uniform national basis are thereby constrained.

Of equal significance, because of the absence of general curtailment guidelines, we have been confronted with emergency situations where emergency action was necessary to prescribe curtailment plans. See Opinion Nos. 634 and 634-A, *El Paso Natural Gas Co.*, 48 FPC 931, 1369, and order dated December 20, 1972, *Mississippi River Transmission Co.*, 48 FPC 1496. In situations where the need to curtail arises suddenly and without anticipation, and where no curtailment plan has been approved, as was true for El Paso and Mississippi River Transmission the pipeline is placed in the difficult position of undertaking service cutbacks at the risk of civil liability to direct and indirect customers if the curtailments are not required by Commission order, or if

the pattern of curtailment is later adjudicated to be unjust or unreasonable. See *International Paper Co.* v. *F.P.C.*, 476 F. 2d 121 (CA5-1973). Similarly, in such situations, pipeline customers and those dependent on pipeline service have no clear basis for conducting their operations.

Finally, our experience with curtailment litigation persuaded us that long-range advance planning by pipelines, distributors, and consumers has been rendered most difficult by the absence of a statement by the Commission of its general policy in curtailment cases.

Because of these considerations, we issued, as a policy statement, Order Nos. 467 and 467-A. We recognized that some flexibility is essential as curtailments first occur, in order to ameliorate the economic dislocations which necessarily ensue, and for that reason we made clear in Order No. 467 that the policy therein stated could, and would, be adjusted in appropriate cases where the hearing record so required.

Procedural and Jurisdictional Arguments

A. *Nature of Order No. 467 and Conformity to the Administrative Procedure Act.*

It is argued by a number of Applicants that Order No. 467, despite its designation as a "Statement of Policy", is really rulemaking and Section 553 of the Administrative Procedure Act requires notice, an opportunity to submit views and to participate. In some cases it is further argued that the action taken by the Commission is actually adjudication rather than rulemaking in that it abrogates or nullifies existing curtailment priorities in contracts and tariffs. On the other hand, Reynolds Metals Company interprets Order No. 467 as not imputing to any

pending curtailment case any controlling substantive effects; it asks that Order No. 467 be clarified to state that in each case the opportunity for evidentiary hearings will be afforded. Alabama Gas Corporation asks for clarification as to whether Order No. 467 is a flexible guideline against which curtailment would be judged.

Order No. 467 is designated "Statement of Policy". It specifically states that "When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation * * *". It therefore falls within the exception for "general statements of policy" within Section 553 of the APA. Our use of Order Nos. 467 and 467-A as policy guidelines is exemplified in *Texas Eastern Transmission Corp., et al.*, Docket No. RP71-130, *et al.*, issued January 29, 1973, 49 FPC 296, requiring Algonquin to show cause why it should not file an amendment to its tariff "to conform with Order No. 467-A".

Orders in Docket No. R-469 are not finally determinative of the rights and duties of a given pipeline, its customers or ultimate consumers; it expressly envisions further proceedings. As a statement of policy, it is excepted by Section 553 from the requirements of the notice and hearing provisions of the Administrative Procedure Act, and, of course, it is not an adjudication within the meaning of that Act.

B. *Effect on Future Tariff Filings.*

In orders in Docket No. R-469 we have set forth the form of curtailment plan preferred by the Commission. We have not attempted to impose this plan on all pipelines and their customers, nor have we attempted to delineate all details which should be embodied in proposed

tariff changes which propose a curtailment plan. At this time, there is still a need for more flexibility than would be possible were we to insist upon one specific form for all curtailment tariffs.

Accordingly, those pipelines which do not yet have a curtailment plan approved by final order of the Commission are still free to file tariff changes under Section 4 in whatever form they choose. Tariffs not in accord with the policies expressed in orders in Docket No. 8-469 will be subject to suspension and hearing, and any curtailments made under nonconforming tariff sheets which have not received Commission approval may be found to be unjust and unreasonable, or preferential or discriminatory, dependent upon the facts proved in an evidentiary hearing. Proposed tariff sheets which conform to the policies expressed in orders in Docket No. R-469 will be accepted for filing, and permitted to become effective, subject to the rights of intervenors to hearing and adjudication of any claim of preference, discrimination, unjustness or unreasonableness of the provisions contained in the proposed tariff sheets, and subject to the further right of any one adversely affected to seek individualized special relief because of extraordinary circumstances. While our present intention is not to suspend tariff sheets which conform to the policies in orders in Docket No. R-469, we do not foreclose our discretionary powers to suspend such tariff sheets under Section 4(e) under appropriate circumstances.

C. *Effect on Pending Cases.*

Orders in Docket No. R-469 are not self-operative in pending cases. Initial decisions, and Commission decisions, will be reached on the record made, applying orders in Docket No. R-469 policies except where deviation

therefrom is required by the evidence. Where insufficient end use data are not available, we will continue to make appropriate provision for the collection of such data. See *e.g.* Opinion No. 634, *El Paso Natural Gas Company*, 48 FPC 931; Opinion No. 643, *Arkansas Louisiana Gas Company*, 49 FPC 53; Opinion No. 647, *United Gas Pipe Line Company*, 49 FPC 179.

Many Applicants, particularly those representing California, argue that a general rule is inappropriate and that each pipeline system should be treated on an individual basis. With one extremely important exception, we are in general agreement with this thesis, at least at this time in the development of curtailment policies and practices. The one area where we believe uniformity to be essential is with respect to whether contract entitlements should form the basis for curtailment, or whether curtailment should be based on end use factors. As a matter of policy, we have determined that end use must be controlling. Our reasons for so concluding are articulated in Opinion No. 643, *Arkla, supra*, and Opinion No. 647, *United Gas, supra*.

As a Statement of Policy, orders in Docket No. R-469 will serve as a guide in other proceedings, specifically those arising under Order No. 431. By these orders the parties are on notice that we consider the type of curtailment plan set forth in the Orders to be just and reasonable, nondiscriminatory and nonpreferential. This does not mean that the parties may not propose or the Commission may not adopt variations on the Sec. 2.78(a) plan, but there must be evidence in the record to support any such variations. Nor does it mean that adversely affected pipeline customers may not claim a right to special relief from the operation of a Sec. 2.78(a) plan, but

in such instances there must be evidence to support any such claim. In this way, Sec. 2.78(a) will assist the parties and the Administrative Law Judge in arriving at a curtailment plan which will meet the problems created by diverse needs for gas in the face of a nation-wide gas shortage and at the same time be adapted to the peculiarities, if any, of the particular pipeline system involved.

D. *Control of End Use.*

It is argued that in a curtailment proceeding under Sections 4 and 5 of the Act, the FPC cannot control end use. The Applicants cite *Fuels Research Council* v. *F.P.C.*, 374 F. 2d 842 (CA7-1967), where it was argued that the Commission should have designed rates to discourage use of gas in power plants, and the Court held the Commission had no such authority. Furthermore, in the *Hope* case[1], the Court said that it failed to find in the power to fix just and reasonable rates the power to fix rates which will disallow or discourage resales for industrial use.

The Courts in those cases were not faced with a nation-wide gas shortage, and rates were involved, not allocations or curtailments. *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) confirms the Commission's broad powers to devise effective means of meeting its responsibilities. These include Section 16, providing that the Commission "shall have power to perform any and all acts necessary or appropriate to carry out the provisions" of the Gas Act, and Sections 4 and 5 dealing with rates, service and contracts. Section 4 prohibits any "undue preference or advantage" or any "unreasonable difference" in service, and Section 5 grants the Commission the power to determine "the just and reasonable * * * classification, rule, regulation, practice, or contract to be

[1] *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 616 (1944).

observed." The Gas Act says (Section 1) "that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest." It is our conclusion that we have ample authority to require that curtailment plans be based on the end use of gas the direct customers of the pipeline or the customers of the distributing companies.

E. *Requested Clarifications and Modifications.*

Many Applicants seek clarification of Order No. 467 by Commission definition of all terms used, or modification of the substance of Order No. 467 by a reordering of priorities. These applicants err in treating Order Nos. 467 and 467-A as a rule of substance, which precisely defines the curtailment rights and obligations of all pipelines and all pipeline customers. We ascribe no such effect to Order Nos. 467 and 467-A, for, as already stated, these Orders are intended only to state initial guidelines as a means of facilitating curtailment planning and the adjudication of curtailment cases.

On the same date Order No. 467 was issued, we noticed a proposed policy statement in Docket No. R-467, 38 F.R. 1517. We therein seek comments on stated priorities of service, which priorities the Commission would implement "* * * in all matters arising under the Natural Gas Act." It is not mere coincidence that the priority system noticed in Docket No. R-467 is the same as that set forth in Order No. 467. The comment time has not expired in Docket No. R-467, and we will give due consideration to all comments therein received.

We find it apropriate, however, to modify Section 2.78(a) of our Regulations in one respect, in order to clarify our intent that while end usage of natural gas is

controlling in curtailment situations, for the present the immediate impact of curtailment on small volume interruptable users should be lessened, and, for the present, the alternate fuel capabilities of interruptable users should be considered. As already noted, we will, after receipt and consideration of comments in Docket No. R-467, issue such definitions and clarifications of the terms used in determining priorities of service as may be necessary and desirable. One such area of concern will be a useful and workable demarcation between "interruptable" and "firm" service, bearing in mind that these terms are susceptible of differing interpretations. Pending resolution of this matter on the basis of a full record, we modify Section 2.78(a) of our Regulations in the particulars hereinafter stated.

The Commission finds:

(1) The notice and effective date provisions of 5 U.S.C. 553 do not apply with respect to the amendment to the policy statement here adopted.

(2) It is appropriate and in the public interest in administering the Natural Gas Act to adopt the amendment to the policy statement herein ordered.

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7 and 16 (52 Stat. 822, 824, 825; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72; 15 U.S.C. 717c, 717d, 717f), *orders:*

(A) Part 2 of the Commission's General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new paragraph at the end of Section 2.78(a) and, as amended, it will read as follows:

§2.78 Utilization and Conservation of Natural Resources—Natural Gas

(a) The national interests in the development and utilization of natural gas resources throughout the United States will be served by recognition and implementation of the following priority-of-service categories for use during periods of curtailed deliveries by jurisdictional pipeline companies:

(1) Residential, small commercial (less than 50 Mcf on a peak day).

(2) Large commercial requirements (50 Mcf or more on a peak day), firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

(3) All industrial requirements not specified in (2), (4), (5), (6), (7), (8), or (9).

(4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

(6) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), where alternate fuel capabilities can meet such requirements.

(8) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

(9) Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

The priorities-of-deliveries set forth above will be applied to the deliveries of all jurisdictional pipeline companies during periods of curtailment on each company's system; except, however, that, upon a finding of extraordinary circumstances after hearing initiated by a petition filed under Section 1.7(b) of the Commission's Rules of Practice and Procedure, exceptions to those priorities may be permitted.

The above list of priorities requires the full curtailment of the lower priority category volumes to be accomplished before curtailment of any higher priority volumes is commenced. Additionally, the above list requires both the direct and indirect customers of the pipeline that use gas for similar purposes to be placed in the same category of priority.

The tariffs filed with this Commission should contain provisions that will reflect sufficient flexibility to permit pipeline companies to respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property.

(B) The amendment provided for herein shall be effective as of the date of issuance of this order.

(C) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

COLUMBIA GAS TRANSMISSION CORP., FERC DOCKET NO. RP72-89, ORDER ISSUED OCT. 26, 1977

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

ACCEPTANCE FOR FILING CURTAILMENT

Before Commissioners: Charles B. Curtis, Acting Chairman; Don S. Smith and Georgianna Sheldon, Acting Commissioners.

Columbia Gas Transmission Corporation	))	Docket No. RP 72-89

ORDER GRANTING MOTION REGARDING PROPOSED TARIFF PROVISIONS, DIRECTING THE SUBSTITUTION OF TARIFF SHEETS, AND PERMITTING INTERVENTIONS

(Issued October 26, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if

the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of these proceedings were specifically transferred to the FERC by Section 402(a) (1) of the DOE Act.

The joint regulation adopted on October 1, 1977, by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR....., provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On August 3, 1977, as supplemented September 9 and September 30, 1977, Columbia Gas Transmission Corporation (Columbia) submitted for filing Sixth Revised Sheet Nos. 62, 62A, and 62B, Fourth Revised Sheet No. 62C, First Revised Sheet No. 62D, and Original Sheet No. 62E to Columbia's FPC Gas Tariff, Original Volume No. 1, pertaining to daily curtailment procedures and the disposition of penalties.

On September 28, 1977, Columbia filed a motion for approval of certain proposed curtailment tariff provisions set forth in Appendix A thereto for which an effective date of November 1, 1977, is requested. Those provisions represent modifications of the proposed daily curtailment procedures set forth in the above-mentioned August 3 filing that were agreed upon at an informal conference by Columbia and its participating wholesale customers with no objection by the Commission staff.

The aforementioned conference was held after Notice of the August 3 filing and a September 9, 1977 supplement thereto was published in the Federal Register; and certain objections to the proposed tariff provisions, together with numerous requests for an informal conference, were received. Also, pursuant to our Notice, timely petitions for leave to intervene were filed by General Motors Corporation (General Motors) [1]/ and National Fuel Gas Supply Corporation, which purchases natural gas from Columbia.

In support of its motion, Columbia states that the proposed tariff provisions as modified therein are supported by all of its wholesale customers participating at the conference as well as the Public Service Commission of New York, the Public Utilities Commission of Ohio, and three indirect customers, with no objection by the Commission staff. Columbia further states that upon receipt of a Commission order approving the revised curtailment procedures contained in Appendix A it will withdraw its August 3 tariff filing and, in lieu thereof, file tariff sheets incorporating the agreed upon curtailment procedures to be effective on and after November 1, 1977.

Pursuant to our Notice published in the Federal Register, answers or objections to Columbia's motion were due on or before October 7, 1977. On October 7, 1977, the Cities of Charlottesville and Richmond, Virginia, filed an answer supporting Columbia's request but indicating that daily curtailment implementation on an end-use basis with a demand charge adjustment provision in effect would be necessary if the proposed provisions were intended for regular rather than emergency use. On that date also, the Public Service Commission of the

[1]/As the Notice indicates, the petition to intervene by General Motors is not necessary since it has already been authorized to intervene in this proceeding.

State of New York and Pennsylvania Gas and Water Company filed responses supporting the motion.

The proposed tariff provisions contained in Appendix A to Columbia's motion embody revised curtailment procedures resulting from discussions among Columbia, its wholesale and indirect customers, various State commissions, and the Commisison staff. Since no objection has ben raised to these provisions as an emergency measure, we would accept for filing tariff sheets containing the proposed revised curtailment procedures to be effective November 1, 1977. Accordingly, we shall direct Columbia to file appropriate tariff sheets incorporating the tariff provisions in Appendix A of its motion, and to withdraw its August 3, 1977 tariff filing, as supplemented.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that Columbia's motion filed September 28, 1977, to accept for filing the proposed tariff provisions contained in Appendix A thereto be granted, and that Columbia be directed to file appropriate tariff sheets embodying such tariff provisions to be effective November 1, 1977, and to withdraw its August 3, 1977, tariff filing, as supplemented.

(2) The participation of the above-named petitioners in this proceeding may be in the public interest.

The Commission orders:

(A) Columbia's motion filed September 28, 1977, to accept for filing proposed tariff provisions contained in Appendix A thereto, is hereby granted.

(B) Within seven days from the date of issuance of this order, Columbia shall file appropriate tariff sheets

to be effective November 1, 1977, containing the proposed tariff provisions in Appendix A of Columbia's motion filed herein on September 28, 1977, and shall withdraw its August 3, 1977, tariff filing, as supplemented.

(C) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission; *Provided, however,* that participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any order or orders of the Commission entered in this proceeding.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.

COLUMBIA GAS TRANSMISSION CORP.,
FERC DOCKET NO. RP72-89,
LETTER ORDER ISSUED NOV. 18, 1977

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

In reply refer to:
BNG-76
Columbia Gas Transmission Corporation
Docket No. RP72-89

NOV. 18, 1977

Columbia Gas Transmission Corporation
P. O. Box 1273
Charleston, West Virginia 25325

Attention: B. D. Perine, Vice President

Reference: See Tariff Sheets Listed on Appendix A

Gentlemen:

The referenced tariff sheets revising the daily curtailment procedures of your curtailment plan have been accepted effective November 1, 1977, in compliance with Commission Order issued October 26, 1977, in Docket No. RP72-89.

Further, your request to withdraw your August 3, 1977, curtailment filing as supplemented on September 9 and 30, 1977, has been granted in compliance with the October 26th order.

This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of the referenced filing or of any rate, charge, classification, or any rule, regulation or practice

affecting such rate or service contained in your tariff; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

Very truly yours,
Secretary

cc: All Parties

C. Ronald Tilley, Vice President
Columbia Gas Systems Service Corporation
1625 Eye Street, N. W.
Washington, D. C. 20006

APPENDIX A

Columbia Gas Transmission Corporation
FERC Gas Tariff Original Volume No. 1

Sixth Revised Sheet No. 62
Sixth Revised Sheet No. 62A
Sixth Revised Sheet No. 62B
Fourth Revised Sheet No. 62C
First Revised Sheet No. 62D
Original Sheet No. 62E

Supreme Court, U. S.
FILED
SEP 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1979

No. 79-63

Columbia Gas Transmission Corporation,
Petitioner,

v.

Southgate Development Corporation,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR LORAIN COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of The United States

October Term, 1979

No. 79-63

Columbia Gas Transmission Corporation,
Petitioner,

v.

Southgate Development Corporation,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR LORAIN COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Southgate Development Corporation ("Southgate") respectfully requests that this court deny the petition for writ of certiorari, seeking review of the decision and journal entry of the Court of Appeals for Lorain County entered on April 20, 1979, which appears at pp. 3a-9a in the Appendix of the Petition filed with this court, for any one or more of the following reasons:

1. The decision and journal entry is not a *final* judgment, within the meaning of 28 U.S.C. §1257;

2. The Court of Appeals by such decision and entry did not decide "a federal question of substance" within

the meaning of Rule 19(1) (a) of the Rules of the Supreme Court of the United States; nor was its decision and entry based upon a determination of any of the federal issues enumerated in paragraph (3) of 28 U.S.C. §1257; and

3. To the extent that Petitioner, Columbus Gas Transmission Corporation ("Columbia Transmission"), is claiming that the Supremacy Clause of Article VI of the Constitution of the United States would require a judgment or decree contrary to that of the Ohio Court of Appeals, such cannot be considered as a final judgment or decree "rendered by the *highest* court of a State" since such issue was never properly appealed to the Ohio Supreme Court pursuant to provisions of the Ohio Constitution and to the rules of the Ohio Supreme Court.

STATEMENT OF THE CASE

From the inception the fundamental issue underlying this case has been whether Columbia Transmission as the admitted *owner* of a right-of-way easement, and as the admitted *owner* and *user* of an interstate pipeline constructed therein over and through land owned by Southgate, owes *any* obligation to Southgate where the principal consideration, agreed to by arms length negotiation between the prior owner of both the easement and the pipeline, Ohio Fuel Gas Company, and the prior owner of the land, Cleveland Trust Company, was the right of the "Grantor, its heirs and assigns," to "purchase gas therefrom" until such time as the pipeline be removed or abandoned.

Throughout the litigation in the state courts, the principal contention of Columbia Transmission has been that *it* has *no obligation whatsoever* under the terms of the easement deed; that it may nevertheless continue to own, occupy, and use the easement to its full advantage; but that any and *all obligations* under the terms of the easement deed "devolved" upon an *intrastate* gas utility company, i.e. Columbia Gas of Ohio, Inc. ("Columbia of Ohio"), a separate corporation. Based upon his interpretation of the intent of the Ohio Public Utilities Commission at the time that it approved the 1964 "spin-off" of the corporate assets of Ohio Fuel, the trial court agreed with this contention, and on this basis concluded that "Columbia of Ohio is the obligor of gas to Southgate," and thus rendered judgment "for the defendant," Columbia Transmission. (p. 16a of Petition)

In its appeal to the Court of Appeals, Southgate assigned as error:

"1) The Common Pleas Court erroneously concluded that the right to purchase gas from an interstate gas transmission pipeline granted in a right of way easement covenant as part of the consideration for the right of way is subject to regulation by the Public Utilities Commission of Ohio and, therefore, 'devolved' upon Columbia Gas of Ohio, Inc. pursuant to PUCO order, whereas in truth such right is subject to regulation only by the Federal Power Commission (now Federal Energy Regulatory Commission) and is beyond the jurisdictional reach of the Public Utilities Commission of Ohio, and

"2) Columbia Transmission Corporation breached its obligation under the right of way covenant by refusing to take any action to comply therewith, including the filing of an application with the Federal Power Commission for a certificate of public convenience and necessity authorizing Columbia Transmission to fulfill its contractual obligation."

The arguments of Columbia Transmission in its brief to the Court of Appeals contra Southgate's assignments of error were under the following subheadings:

"(1) Sales of gas by a public utility pursuant to right-of-way covenants have always been held to be utility sales under PUCO jurisdiction, and were specifically held to be such in the case of Ohio Fuel Gas Comapny.

(2) The universal rule of American law is that a State regulatory agency can modify or even abrogate contracts for utility service.

(3) The PUCO had jurisdiction to order in 1963 . . . that Ohio Fuel's duty to serve under right-of-way covenants such as in this case . . . should devolve upon Columbia Gas of Ohio.

(4) Although Columbia Transmission is not now a public utility under Ohio law, it would become such if it commenced the retail sale of gas under the thousands of right-of-way covenants granted by Ohio Fuel.

(5) As soon as the gas shortage eases so as to permit utility service to new customers such as Southgate, the regulatory statutes provide a means for Southgate to enforce its rights thereto.

(6) No matter who has the duty to serve Southgate, Southgate is not entitled to an unlawful preference during the emergency of the gas shortage, so that the refusal to render service does not breach the right-of-way covenant and would not support an award of damages."

The Court of Appeals decision and entry rejected the argument of Columbia Transmission that "any duties under the right-of-way easement 'devolved' upon Columbia Gas of Ohio" (p. 6a), and also rejected "defendant's argument that the PUCO has exclusive jurisdiction in this matter" (p. 7a), and on such basis sustained Southgate's first assignment of error.

The Court of Appeals also sustained Southgate's second assignment of error, stating with respect thereto:

"Based on our discussion above, we hold that Columbia Transmission had a contractual obligation to attempt to secure the necessary authorization to provide Southgate with natural gas service.

The question of when, or even whether, Southgate will receive natural gas service is for the appropriate regulatory agency to answer. We decide here only that Columbia Transmission had a duty to seek authorization under the right-of-way

easement agreement. That duty was breached, and Southgate alleges damages from that breach, the existence and amount of which must be determined by the trial court.

We reverse and remand this cause to the trial court for further proceedings in accordance with this opinion."

Rule 12 of the Ohio Rules of Appellate Procedure provides that in every appeal from a trial court of record to a court of appeals "[t]he appeal shall be determined on its merits on the assignments of error set forth in the briefs. . ., on the record on appeal. . ., and . . . on the oral arguments of the parties, or their counsel. . .," and requires that "[a]ll errors assigned and briefed shall be passed upon by the court in writing. . . ." Having thus sustained both of Southgate's assignments of error and stated its reasons therefor in writing, the Court of Appeals had fully complied with all Ohio procedural requirements. In such appeals the Court of Appeals is not required to discuss every "argument" made by the appellee.

Thereafter, Columbia Transmission, on the basis of the claim that the case was of public or great general interest, requested the Ohio Supreme Court, pursuant to Article IV, Section 2(B) (2) (d), to direct the Court of Appeals to certify the record to the Ohio Supreme Court. It did not, however, pursuant to Ohio procedure attempt to apepal to the Ohio Supreme Court as a matter of right under Article IV, Section 2(B) (2) (a) (iii), on the basis that the case involved "questions arising under the constitution of the United States." The Ohio Supreme Court denied the motion to certify the record, and thereafter the petition for writ of certiorari was filed by Columbia Transmission in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I

Not a Final Judgment or Decree

By the terms of 28 U.S.C. §1257 the jurisdiction of this Court to review judgments of a state court requires that there be a "[f]inal judgment or decree."

Ordinarily an order which, as here, determines liability or breach of a duty, but leaves the determination of damages to be decided on remand, could not be considered as a "final judgment or decree" of the state court. *State of Washington, ex rel. Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, 243 U.S. 251 (1917); *Bruce* v. *Tobin*, 245 U.S. 18 (1917). See also *NAACP* v. *Williams*, 359 U.S. 550 (1959).

As stated in *Grays Harbor*, supra:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court, . . . as laying down the law of the case, this court will not be thus bound."

We would submit that, in general, any remand by a state appellate court to a state trial court for the purpose of determining "the existence and the amount" of damages cannot be construed to be "the final word" of a state court [*Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551 (1945)], and that the application of the "practical rather than a technical construction" of the "final judgment" requirement [*Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)]

cannot logically or reasonably be expanded to encompass the decision and entry of the Court of Appeals herein within such jurisdictional requirement.

Moreover, we would submit that the instant case does not fall into any of the "four categories" of cases in which this court "has treated the decision of the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). These "four categories" involve "recurringly encountered situations in which the highest court of a state has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." Id. p. 477. In the instant case, as will be discussed under Part II, infra, the judgment of the Court of Appeals was not based upon a determination of any "federal issue," within the purview of 28 U.S.C. §1257(3).

II

Judgment Not Based Upon Determination of Federal Issue

Petitioners seeks to invoke this court's jurisdiction under paragraph (3) of 28 U.S.C. §1257. Since neither the "validity of a treaty or statute of the United States" nor the "validity of a State statute" (on the ground of its being repugnant to the Constitution, treaties or laws of the United States) has been "drawn into question," no "federal issue" can be said to "present" in this case unless the case could be said to involve a "title, right, privilege or immunity" which "is specially set up or claimed under the Constitution, treaties or statutes. . . of . . . the United States," but which claim was specifically rejected by a "final judgment" of the "highest court" of Ohio.

Although not explicitly stated, Columbia Transmission apparently is claiming that it possesses an "immunity" from suit for breach of contract by virtue of its failure to comply with the consideration provision in the grant of the right-of-way easement. If so, Columbia Transmission has not "specially set up" such a claim and has made no reference to any specific provision of the Constitution or the statutes of the United States which would so provide. To the contrary, the "Fourth Defense" which Columbia Transmission now asserts "led directly to the primary federal question presented in this appeal" (p. 6), was to the effect that Southgate sought "a preference in contravention of the policies" of the FPC [now the FERC]; and that those cases in which the FPC authorized the actual delivery of gas to serve right-of-way customers, who had been promised such gas as the consideration or

part of the consideration for granting of an easement, were factually distinguishable, and that its failure to even make application to the FERC was legally excusable upon the basis that, in the opinion of Columbia Transmission, the FERC would not have granted any such application even if made; in other words, relegating to itself the right to determine what the FERC would or would not have done.

It is asserted (p. 6) that although Columbia Transmission in its reply brief in the Court of Appeals "urged the substance of the Fourth Defense," the Court of Appeals "completely ignored this argument and held that Columbia Transmission had a contractual duty to Southgate which had been breached."

The only reference in the forty-one page brief of Columbia Transmission, filed in the Ohio Court of Appeals, to the "supermacy clause" as it might potentially be applicable to any award of damages, is contained in a single sentence of the brief at p. 38 reading:

> "If the courts of Ohio should award damages, they would be imposing State policy ahead of and in opposition to FERC policy; and, under the Backus rule [*Backus* v. *Panhandle Eastern Pipeline Co.*, 558 F. 2d 1373 (10th Cir. 1977)], this would be invalid under the supremacy clause."

We believe that such falls far short of the requirement that the "federal issue" be brought to the attention of the state court with "fair precision." *Street* v. *New York*, 394 U.S. 576 (1969). Moreover, such method of presentation falls far short of the requirement of Rule 23(f) of the rules of this court that "the statement of the case shall also specify the stage in the proceedings . . . in the appellate court, at which, and the manner in which, the federal questions sought to be

reviewed were raised; the method of raising them. . .; and the way in which they were passed upon by the court;" and with specific reference to the record "as will show that the federal question was timely and *properly raised* so as to give this court jurisdiction to review the judgment on writ of certiorari." (Emphasis added)

Under such state of the record we suggest that another rule, enunciated by this court in *Street* v. *New York*, supra, is applicable. This court therein stated that:

> "When, as here, the highest state court has failed to pass upon a federal question, it will be presumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

This same rule also is announced in *Fuller* v. *Oregon*, 417 U.S. 40 (1974).

Columbia Transmission contends (p. 9) that the Court of Appeals "decided a federal question of substance not in accord with" this court's decision in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). That case did not involve, nor did it even discuss, the question of damages for breach of a contractural obligation entered into as the consideration for the granting of a deed of easement.

Columbia Transmission also asserts (p. 14) that the judgment of the Court of Appeals "by upholding Southgate's claim for damages and refusing to consider the effect of" an FPC order conflicts with decisions of the United States Courts of Appeals for the District of Columbia and the Tenth Circuits, as well as administrative decisions. Neither of the decisions cited by Colum-

bia Transmission in support of this assertion involved consideration of the question of damages. Thus, it is asserted only that *City of Huntingburg* v. *FPC*, 555 F. 2d 1033 (D.C. Cir. 1977) "implicity supports" Columbia Transmission's contentions, and that *Backus* v. *Panhandle Eastern Pipeline Co.*, supra, [558 F. 2d 1373] "[b]y extension" suggests that an award of damages on Southgate's theory of the case would be unconstitutional state action.

With respect to the assertion that the judgment of the Court of Appeals is in conflict with FPC order No. 467-B, it should suffice to point out that such order, as well as orders which preceded it, were "intended only to state initial guidelines as a means of facilitating curtailment planning and the adjudication of curtailment cases." (p. 37a) Moreover, *International Paper Company* v. *Federal Power Commission*, 476 F. 2d 121 (5th Cir. 1973), referred to at p. 11 of the petition, concluded that "a court which has the actual damage suit before it, and also the final FPC action, is best suited to determine the applicability of a defense recognized in contract law." 476 F. 2d at p. 126.

Columbia Transmission contends [pp. 11, 12] that the FPC's "original policy decision" had held that "an approved curtailment plan constructed an absolute defense for breach of contract"; that the Fifth Circuit "reversed" in *International Paper Company*, supra; that thereafter the FPC revised its position thereby concluding that "an approved curtailment plan would be a defense to an action for breach of contract, except where the pipeline had to curtail its services due to its own negligence, bad faith, or wrongful conduct."

The history of the various rulings of the Fifth Circuit with respect to the policy positions of the FPC is

discussed in detail in the opinion of that circuit in *Mississippi Power & Light Company* v. *United Gas Pipe Line Company*, 532 F. 2d 412 (1976). As pointed out therein, necessity for curtailment gives rise to "two distinct problems":

(1) "how much of the available supply of natural gas each of the pipeline's customers would receive," and

(2) "who would bear the economic consequences of the shortage."

It will be noted that subsequent to the adoption by the FPC of the policy that damages could not be obtained in the absence of "negligence, bad faith, or other wrongful conduct," the Fifth Circuit in *State of Louisiana* v. *FPC*, 503 F. 2d 844 (1974) again vacated the FPC's findings. In its decision in *Mississippi Power & Light Company* the court at p. 416 stated that "since the Commission cannot adjudicate contract liability," its policy determination should be based on the assumption that the natural gas company "faces possible liability—not on the assumption it is immune."

In *Monsanto Company v. FPC*, 463 F. 2d 799 (1972), the United States Court of Appeals for the District of Columbia Circuit held that even though FPC had jurisdiction to approve a natural gas company's curtailment proceeding, it did not automatically follow that industrial gas users having a firm contract with the natural gas company are precluded from bringing breach of contract actions against that company.

Columbia Transmission also appears to be asserting that it is immune from any damage suit of the type involved here based upon the approval by the FERC of certain tariff provisions contained at pp. 41a-45a of its petition.

Even those federal cases which have delayed final determination of an action for breach of contract, such as involved here, until reference has been made to the FERC with respect to its position on certain issues, recognize that in the last analysis the question of whether there is a breach of contract, and the question of the determination of damages, if any, resulting therefrom *must be determined in a court of law* and are not and cannot be determined by a regulatory agency, such as the FERC. *Carter* v. *American Telephone & Telegraph Co.*, 365 F. 2d 486 (5th Cir. 1966); *Consolidated Edison Co. of New York, Inc.* v. *FPC*, 512 F. 2d 1332 (1975); *Monsanto Company* v. *FPC*, supra, [463 F. 2d 799]. In *CF Industries, Inc.* v. *Transcontinental Gas Pipe Line Corporation*, 452 F.Supp. 358 (D.C. W.D. N.C. 1978), the court concluded that the extent to which a curtailment plan ordered by an regulatory agency can immunize a pipeline from damage liability involves variants of well-known contract defenses "which are within the conventional competence of courts and juries."

Columbia Transmission also asserts that the Court of Appeals decided a federal question of substance not in accord with applicable decisions of this court by its holding that FERC "had exclusive jurisdiction to direct retail sales from an interstate transmission pipeline, to the exclusion of the Public Utilities Commission of Ohio," (p. 18) What the Court of Appeals actually did was to reject Columbia Transmission's argument that the PUCO had "exclusive jurisdiction in this matter." As a matter of fact, Columbia Transmission had stipulated that if it, and not Columbia Gas of Ohio, had obligated itself by contract to Southgate, as the successor to the grantor of the easement, the approval of the FERC would be required in order for it to fully

fulfill such obligation. The Court of Appeals correctly concluded (p. 7a) that this court in *FPC* v. *Louisiana Power & Light Co.*, supra, [406 U.S. 621] had held that the FPC had authority to regulate curtailment of direct intrastate sales of natural gas (not involving sales for resale) under its regulatory power over "the transportation of natural gas in interstate commerce." As noted therein (p. 638), the proviso of §1(b) "withheld from FPC only *rate-setting* authority with respect to direct sales" and "[c]urtailment regulations are not *rate-setting* regulations but regulations for the 'transportation' of natural gas, and thus within FPC jurisdiction. . . ."

Since the question of "rate-setting" is not involved herein, the Court of Appeals quite properly concluded that it is the FERC, and not the Ohio Public Utilities Commission, which is vested with the power to regulate curtailment of *direct* sales of natural gas from an interstate pipeline.

Whether Columbia Transmission would or would not have been in breach of contract had it made application to FERC to fulfill its contractural obligation to Southgate is not involved herein since as the only legal entity permitted to file an application with the FERC for such authority, it has simply refused to do so. Its authority to so file is contained in 15 U.S.C. 717f(c).

The Ohio law of contracts places upon Columbia Transmission the duty to seek such authority. As held in *Security Sewage Equipment Co.* v. *McFerren*, 14 Ohio St. 2d 251 (1968), one who contracts to render a performance for which a government approval is required assumes the duty of obtaining such, and the risk of its refusal is on him. See also *Corbin on Contracts*, 435, Section 1368.

We would submit, therefore, that the judgment of

the Court of Appeals was based upon applicable Ohio law and did not involve any "federal issue" within the contemplation of 28 U.S.C., §1257(3), or any "federal question of substance" within the purview of Rule 19 of this court.

III

Final Judgment Not Rendered by Highest Court of State

The "federal issue" asserted by Columbia Transmission is to the effect that the decision and judgment of the Court of Appeals conflicts with the Supremacy Clause of Article VI of the Constitution of the United States. Thus, petitioner is asserting that this case involves questions arising under the Constitution of the United States.

Article IV, Section 2(B) (2) (a) (iii) provides that the Ohio Supreme Court shall have appellate jurisdiction in appeals from the courts of appeals *as a matter of right* in cases "involving questions arising under the constitution of the United States. . . ." Such appeal as a matter of right must be distinguished from the authority of the Ohio Supreme Court under Article IV, Section 2(B) (2) (d) in "cases of public or great general interest" to "direct any court of appeals to certify its record to the Supreme Court" in which event the Ohio Supreme Court has authority to "review and affirm, modify, or reverse the judgment of the court of appeals."

Rule I, Section 1(A) (c) of the Rules of Practice of the Supreme Court of Ohio requires that the notice of appeal shall state "[i]f applicable, that the case involves a substantial constitutional question." Rule II, Section 3(B) provides that "[w]here appellant claims that he has an appeal as of right (i.e. that the case involves a constitutional question), the Supreme Court will *sua sponte*, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion

to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case."

In the instant case the notice of appeal by Columbia Transmission did not claim that the case involved a substantial constitutional question, and thus the Ohio procedural requirements required to institute an appeal as of right under the provisions of the Ohio constitution were not met.

The Rules of Practice of the Supreme Court of Ohio may be found in 26 Ohio St. 2d and Rule I, as amended, in 50 Ohio St. 2d.

This court has held that the judgment of an intermediate state appellate court may be considered to be that of the "highest court of [the] State" where a review of the judgment of the intermediate court is denied by the highest court in the exercise of its power to allow a discretionary review. Even such discretionary review, however, must be sought in the right way. *Gotthilf* v. *Sills*, 375 U.S. 79 (1963).

Where an order dismissing the attempted appeal to the highest court of the state is based upon failure to conform to state rules of practice, neither the order of the state court nor that of the intermediate state court will support this court's jurisdiction. *Newman* v. *Gates*, 204 U.S. 89 (1907); *Chesapeake & Ohio R. Co.* v. *McDonald*, 214 U.S. 191 (1909); *Hammerstein* v. *Superior Court*, 241 U.S. 491, 492 (1951).

In *Matthews* v. *Huwe*, 369 U.S. 262 (1925), the distinction between the authority of the Ohio Supreme Court to dismiss an appeal in a case involving a claimed constitutional question (which would be a "decision of the merits") and the authority of that court to deny a discretionary review was recognized. In *Matthews*, an appeal as of right was attempted, but no attempt was

made to apply to the court for discretionary review. Under these circumstances the opinion of Chief Justice Taft concluded that the decree of the Court of Appeals did not become that of the "highest court." By a parity of reasoning, we would submit that where, as here, no attempt was made to appeal as of right to the Ohio Supreme Court on the basis that the case involved "questions arising under the constitution of the United States" (a procedure which is specifically provided for in the Ohio constitution and in the Rules of Practice of the Supreme Court of Ohio), the decision and entry of the Court of Appeals should not be considered as that of the "highest court" of the State of Ohio, the Ohio Supreme Court.

In *Michigan* v. *Tyler*, 436 U.S. 499 (1978), the footnote at p. 512 states that a failure to "present a federal question in conformity with state procedure constitutes an adequate and independent ground of decision bearing review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." No claim has been made, nor could it be made, that Ohio does not have a legitimate interest in enforcing its procedural rule.

The order of the Supreme Court of Ohio is contained at p. 2a of the petition. It will be noted that this order is directed only toward a motion for an order directing the Court of Appeals for Lorain County to certify its record, such motion being overruled. Had an appeal of right been taken on the basis of the claim that the case did involve "questions arising under the constitution of the United States," the dismissal of such claim, pursuant to Rule II, Secton 3(B), would have been contained on an order which in pertinent part would have read:

"This cause, here on appeal as of right from the Court of Appeals for _____ County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein."

In *Beck* v. *Washington*, 369 U.S. 541 (1962), this court held that each state may "prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this respect are no less applicable when Federal rights are in controversy then when the case turns entirely upon questions of local or general law."

CONCLUSION

For any and all of the reasons heretofore stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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